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Supreme Court, U.S.
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No. 00-121

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA") is tolled during the pendency of such an application.

PARTIES TO THE PROCEEDINGS

Sherman Walker ("Walker") was the habeas corpus petitioner and appellant in the courts below, and is the respondent in this Court. Christopher Artuz (the "State") was the habeas respondent and appellee in the courts below. George Duncan (the "State"), petitioner in this Court, is substituted for Mr. Artuz, now retired, as the Superintendent of the Great Meadow Correctional Facility in Comstock, New York, in which respondent Walker is now imprisoned.

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OPINIONS BELOW

The opinion of the Second Circuit is reported at 208 F.3d 357 (2d Cir. 2000) and is set forth in Petition Appendix A. The unreported Memorandum and Order of the district court, dated May 6, 1998, is set forth in Petition Appendix B. The unreported Memorandum and Order of the district court, dated July 9, 1996, is set forth in Petition Appendix C.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on March 27, 2000. The 90-day period for filing a petition for certiorari ended on June 25, 2000. By order dated June 19, 2000, Justice Ginsburg granted an extension of the 90-day period to file a petition to and including July 25, 2000. This petition was filed prior to that date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 101, 110 Stat. 1214, 1217 provides in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (Supp. 2000).

STATEMENT OF THE CASE

A. Introduction

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 § 101, 110 Stat. 1214, 1217 established for the first time a one-year statute of limitations applicable to any application for a federal writ of habeas corpus. In most cases, the period runs from the "conclusion of direct review" of the state court judgment confining the petitioner to state custody. 28 U.S.C. § 2244(d)(1)(A) (Supp. 2000).

The one-year limitations period is tolled, however, during the pendency of "a properly filed application for State post-conviction or other collateral review." *Id.* § 2244(d)(2). With respect to convictions that became final prior to AEDPA's effective date of April 24, 1996, all of the circuits to address the issue, including the Second Circuit, established a one-year grace period, allowing prisoners to file new federal habeas petitions seeking review of pre-AEDPA convictions up to one year after the effective date of the statute. *See Ross v. Artuz*, 150 F.3d 97, 100-02 (2d Cir. 1998) (citing cases). The tolling provision contained in section 2244(d)(2) applies to this one-year grace period as well. *See, e.g., Bennett v. Artuz*, 199 F.3d 116, 119 (2d Cir. 1999) (holding that "AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction"), *cert. granted and aff'd on other grounds*, 121 S. Ct. 361 (2000) (interpreting "properly filed" language in tolling provision).

The issue in this case arises because Walker filed a federal habeas petition shortly after his State conviction became final. His petition was dismissed without prejudice three months later by the district court (during which time AEDPA became law)

for failure to specify which claims had been exhausted in the state courts in compliance with the requirements of 28 U.S.C. § 2254(b). Rather than filing a renewed federal habeas petition after correcting the pleading defects, or else initiating collateral review proceedings in the State courts to exhaust all claims asserted, Walker waited almost eleven months. He then filed a new federal habeas petition, the subject of this case, but by this time more than one year had passed since AEDPA's effective date. The district court thus dismissed Walker's new petition as time-barred under 28 U.S.C. § 2244(d)(1).

Departing from all of the other United States Courts of Appeals to have considered the issue, the Second Circuit reversed the dismissal. It held that Walker's earlier petition in the federal court qualified as an application for "State post-conviction or other collateral review" within the meaning of the tolling provision applicable to AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(2). Accordingly, the Second Circuit concluded that Walker's earlier petition tolled the one-year grace period for the duration of its pendency (almost three months) in the federal court, rendering Walker's new federal petition timely. The question presented in this case is whether the Second Circuit erred in interpreting the tolling provision of section 2244(d)(2) to encompass federal petitions for habeas review.

B. State Court Convictions

Respondent Sherman Walker was convicted and sentenced for at least three distinct acts of robbery in early 1992. On February 13, 1992, he was convicted of two counts of robbery, in the first degree and in the second degree, after a jury trial in the New York Supreme Court, New York

County. He was sentenced as a second felony offender to concurrent terms of twelve-and-a-half to twenty-five years, and seven-and-a-half to fifteen years, respectively. This conviction was affirmed by the Appellate Division, First Department, on October 3, 1995. *See People v. Walker,* 632 N.Y.S.2d 68 (N.Y. App. Div.) (App. 99a-100a), *leave to appeal denied,* 663 N.E.2d 1268 (N.Y. 1995). (App. 91a)

Thereafter, on February 27, 1992, Walker was convicted and sentenced for a second act of robbery in the second degree following a jury trial in the Supreme Court, Queens County. He received a term of imprisonment of seven to fourteen years. The Appellate Division, Second Department, affirmed this conviction on June 12, 1995. *See People v. Walker,* 628 N.Y.S.2d 951 (N.Y. App. Div. 1995) (App. 101a-103a), *appeal dismissed,* 664 N.E.2d 519 (N.Y. 1996). (App. 95a-96a)

Walker then pleaded guilty in the New York Supreme Court, Queens County, to a charge of robbery in the first degree, arising out of a September 1990 holdup at a jewelry store. Walker was already incarcerated on other prior unrelated charges at the time he was identified by a confidential informant as the leader of a robbery ring and possibly a suspect in this incident, and then positively identified by a jewelry store employee in photographs and a physical lineup. (App. 37a) On June 6, 1992, he was convicted, for the third time, on his guilty plea and sentenced to a term of imprisonment of seven to fourteen years, to run concurrently with the other Queens County sentence. (App. 41a)

The Legal Aid Society was appointed to represent Walker on appeal of each of his three convictions. In the

course of representation, it learned that it had previously represented the person who was a confidential informant and a source of information leading to Walker's identification and arrest, and so withdrew as Walker's appellate counsel on conflict-of-interest grounds. Other appointed appellate counsel was substituted. (App. 82a-83a, 239a-241a)

On appeal of this third conviction, Walker claimed that: (1) the prosecution failed to turn over the prior statement of a testifying witness, which was in its files and which referred to the confidential informant, contrary to *People v. Rosario*, 173 N.E.2d 881 (N.Y.), *cert. denied*, 368 U.S. 866 (1961); (2) his constitutional right to counsel was denied at the lineup because the police failed to contact his counsel retained in a prior, unrelated matter; (3) the lineup was unduly suggestive; and (4) the sentence was excessive. (App. 30a-46a)[1]

Walker's conviction was affirmed on direct appeal to the Appellate Division, Second Department, on June 12, 1995. *See People v. Walker*, 628 N.Y.S.2d 950 (N.Y. App. Div. 1995). (App. 104a-106a) The Appellate Division denied Walker's motion for reargument or leave to appeal to the New York State Court of Appeals (App. 99a-100a), and the New York State Court of Appeals dismissed Walker's application for leave to appeal from these orders on January

1. Walker also filed a pro se supplemental brief on his direct appeal of the second two convictions, claiming that: (1) the prosecution failed to establish the probable cause necessary to justify placing him in a lineup; (2) he was denied his right to counsel at the lineup; and (3) his trial counsel was ineffective. (App. 107a-147a) Walker had moved to withdraw his counsel's brief and to obtain new substituted counsel, based on a detailed specification of counsel's alleged omissions and inadequacies. (App. 245a-256a) The Appellate Division denied the motion, but authorized Walker to file a supplemental brief. (App. 242a-244a)

5, 1996, *see People v. Walker*, 664 N.E.2d 519 (N.Y. 1996). (App. 95a-96a) Walker did not seek direct review from this Court. His third conviction accordingly became final on April 5, 1996, upon the expiration of his 90-day period to petition this Court for a writ of certiorari.

C. Other State Court Proceedings

On April 22, 1992, even before his third conviction (in Queens County), Walker filed a pro se petition for State habeas corpus relief in the New York State Supreme Court, Appellate Division. (Walker was already in State custody for prior unrelated convictions.) Among his included claims, he alleged that he had been denied counsel that he had retained in other matters when he appeared at the lineup leading to his third conviction, and that the court which ordered his appearance in that lineup had lacked personal jurisdiction over him. (App. 259a-282a) The Appellate Division denied the petition on May 7, 1992. (App. 257a-258a)

Following his convictions, Walker initiated repeated challenges in the State courts to the validity of his two Queens County convictions. He twice moved in the trial court (on December 21, 1992 and on May 27, 1993) to vacate both convictions, and the motions were denied by the trial court. (App. 220a-221a, 222a-223a) In August 1993, he moved again in the trial court to reargue the motion to vacate the convictions, in part on grounds of newly discovered evidence in the form of an affidavit from the person identified as the confidential informant. (App. 196a-219a) That motion, to which no response by the State was filed, was denied in an oral decision from the bench. (App. 171a)

Walker thereafter filed in the Appellate Division a proceeding for a writ of mandamus against the trial court judge, seeking an evidentiary hearing or new trial on the basis of the claims in his motion to reargue. (App. 176a-189a) The Appellate Division denied the requested relief on January 17, 1995. (App. 174a-175a) Walker initiated a similar mandamus request in the New York State Court of Appeals (App. 168a-173a), which that court denied in June 1995. (App. 167a)

Finally, on November 24, 1995, Walker filed an application for a writ of error *coram nobis* in the New York State Appellate Division, Second Department, with respect to his two Queens County convictions on grounds of ineffective assistance of counsel. (App. 150a-160a) Walker claimed that: (1) appellate counsel had improperly failed to investigate that the police information from the person identified as the confidential informant was false, and (2) he was deprived of adequate appellate counsel of choice because the Legal Aid Society had thus improperly withdrawn based on its prior representation of the informant. The Appellate Division denied the petition on March 18, 1996, finding no ineffective assistance of appellate counsel. *See People v. Walker,* 639 N.Y.S.2d 932 (N.Y. App. Div. 1996). (App. 148a-149a)

D. Federal Court Proceedings

Three weeks later, on April 10, 1996, Walker filed a single document, constituting a complaint pursuant to 42 U.S.C. § 1983 against the Legal Aid Society and corrections officials, as well as a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of New York.

(App. 79a-90a) Walker claimed that his detention for each of the three robbery convictions was attributable to a violation of his federal constitutional right to the effective assistance of counsel. In particular, he alleged that the Legal Aid Society improperly moved to be relieved as counsel on the basis of an alleged conflict arising out of its previous representation of a confidential informant, because no confidential informant existed in Walker's case. He also claimed that he had notified the Legal Aid Society of this fact, but that they had failed to investigate his claim. He alleged that Legal Aid's withdrawal as counsel denied him his right to counsel of choice and due process of law.

Two weeks after he filed this first federal habeas petition, AEDPA went into effect on April 24, 1996. Within three months from the date of filing of Walker's petition, the district court (Johnson, J.), on July 9, 1996, *sua sponte* dismissed the petition without prejudice (Pet. App. C) "for failure to adequately set forth his claim." *Walker v. Legal Aid Society*, No. 96 CIV 2946, 1996 U.S. Dist. LEXIS 22492, at *4 (E.D.N.Y. July 12, 1996). (Pet. App. 20a) The court explained that "[b]ecause this Court cannot determine which issues have been properly exhausted in state court, the essential allegations of a habeas corpus action have not been presented." *Id.* (Pet. App. 20a)

Following the dismissal of his habeas corpus petition, Walker took no further action with regard to his convictions for nearly eleven months. On April 24, 1997, the one-year grace period for filing a federal habeas corpus petition applicable to pre-AEDPA convictions expired, without Walker having taken any further steps to preserve his rights.

On May 20, 1997, one month after expiration of the one-year grace period (and nearly eleven months after the federal

district court dismissed his earlier federal habeas corpus petition), Walker filed a new habeas corpus petition in United States District Court for the Eastern District of New York, which petition was referred to the same federal district judge who had adjudicated his first federal petition, Judge Sterling Johnson. (App. 23a-46a) This petition challenged only the third conviction, claiming grounds he had asserted on direct appeal: that the State had (1) failed to produce a detective's affidavit referring to the confidential informant at the appropriate juncture, and (2) that the State violated Walker's constitutional right to counsel by failing to adequately notify his retained counsel (in another matter) of his participation in the lineup. (App. 26a-27a)

The State moved to dismiss Walker's habeas corpus petition on the ground that the petition was untimely under 28 U.S.C. § 2244(d) (App. 47a-67a), and Walker filed a reply. (App. 68a-79a) In a Memorandum and Order dated May 6, 1998 (Pet. App. B), the district court (Johnson, J.) dismissed the petition as time-barred under section 2244(d). The court applied the then-applicable rule of the Second Circuit, *see Peterson v. Demskie,* 107 F.3d 92, 93 (2d Cir. 1997), that post-AEDPA petitions challenging pre-AEDPA convictions could be filed within a "reasonable time" after AEDPA's effective date of April 24, 1996, which may or may not extend to a full year after AEDPA's effective date.[2] The district court held that the petition was not filed within a reasonable time because it was not filed until

> over one year and four months after the completion of his direct appeal, over one year after the effective

2. Shortly after the district court's decision, the Second Circuit in *Ross v. Artuz,* 150 F.3d 97, 100-02 (2d Cir. 1998), adopted the one-year grace period for the filing of habeas corpus petitions challenging convictions which became final prior to the effective date of AEDPA. The grace period ran from April 24, 1996, the effective date of AEDPA, to April 24, 1997.

> date of AEDPA, and almost one full year after his first habeas petition was dismissed. Even after being notified that his first habeas petition failed to state a claim, Walker waited almost one year to file his second habeas petition.

(Pet. App. 15a) The district court denied a certificate of appealability. (Pet. App. 16a) Walker moved for reconsideration of the judgment in the district court, which that court denied. (App. 16a-18a)

By order dated December 18, 1998, the Second Circuit granted Walker a certificate of appealability (App. 21a-22a), and subsequently appointed counsel to represent Walker in the appeal.

E. Decision Below

The Second Circuit reversed the district court, reinstating and remanding Walker's petition for further proceedings. *See Walker v. Artuz*, 208 F.3d 357 (2d Cir. 2000). (Pet. App. A) The court concluded that Walker's federal habeas corpus petition was an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), which therefore tolled the approximately 80 days during which Walker's first petition for habeas corpus had been pending after the enactment of AEDPA. *Walker*, 208 F.3d at 361-62. (Pet. App. 10a)

The court reasoned that " 'State' modifies only the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning." *Id.* at 359. (Pet. App. 5a) Finding that "[t]he disjunctive 'or' in the statute creates a distinct break between the two kinds of review," *id.*, the court chose "to adopt an interpretation that gives full meaning to the phrase 'State

post-conviction review,' which includes all state remedies, and the phrase 'other collateral review,' which means federal habeas petitions." *Id.* at 360. (Pet. App. 6a)

Moreover, the court noted that "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Id.* (citation and internal quotation marks omitted). The court based this analysis on its belief "that there were [no] 'other' forms of 'collateral review' that did not come within the scope of 'post-conviction review.' " *Id.* (Pet. App. 7a)

The Second Circuit recognized the overall policy objectives of AEDPA of "streamlining the habeas review process and lending finality to state convictions." *Id.* at 361. (Pet. App. 8a) In the court's view, however, tolling the limitations period during the pendency of a federal petition would not create a loophole that would allow easy evasion of the limitations period through the filing of repeat federal petitions. Because the tolling provision pertains only to "properly filed" applications, 28 U.S.C. § 2244(d)(2), the court reasoned that such successive federal petitions "arguably" would not satisfy the "properly filed" proviso so as to qualify for the toll. *Walker*, 208 F.3d at 360. (Pet. App. 7a)[3] Moreover, the court noted that repeat federal petitions

3. Notably, the Second Circuit's understanding of the phrase "properly filed," 28 U.S.C. § 2244(d)(2), was subsequently rejected by this Court in *Artuz v. Bennett*, 121 S. Ct. 361 (2000). A petition is "properly filed" when "it is delivered to, and accepted by, the appropriate court officer for placement into the official record" and "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Id.* at 363-64. "[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural error." *Id.* at 364.

would be barred by AEDPA's restrictions on successive petitions if an earlier federal petition had been dismissed on the merits or with prejudice. *Id.*

Instead, according to the court, including federal habeas corpus petitions within the scope of section 2244(d)(2) would reward petitioners for filing as soon as possible: "[D]efendants will have an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations." *Walker*, 208 F.3d at 361. (Pet. App. 8a) The court stated that its interpretation would, therefore, promote the statutory objective of efficiency in the review process. *See id.* at 360-61. (Pet. App. 8a)

By order dated November 13, 2000, this Court granted the State's petition for certiorari limited to question 1. (Pet. i; App. 20a)

SUMMARY OF ARGUMENT

Under the guise of giving full meaning to the phrase "State post-conviction or other collateral review" within the tolling provision, the Second Circuit erroneously equated "other collateral review" with federal habeas review. The Second Circuit's reading of section 2244(d)(2) is contrary to the plain text of the provision, applicable canons of statutory interpretation, and the principles of comity and federalism underlying this Court's habeas jurisprudence and AEDPA.

First, the Second Circuit's interpretation would require rewriting the statutory text. Contrary to basic rules of grammar, the Second Circuit disjoined the unitary phrase

"State post-conviction or other collateral review" into distinct parts, thus effectively inserting the only noun, "review", at a second, additional point in the phrase. In so doing, the Second Circuit also rendered the word "State" superfluous. Had Congress intended to toll the statute of limitations for the filing of federal habeas petitions, it simply could have omitted "State" altogether.

The Second Circuit based its interpretation on the erroneous assumption that no state "other collateral review" exists other than state "post-conviction" review. In fact, state courts make available a range of state collateral proceedings that are not "post-conviction" challenges, including challenges to confinement in a state mental facility or to pretrial detention. It is to state proceedings like these that the phrase "other collateral review" refers.

Second, the Second Circuit's interpretation is inconsistent with longstanding principles of statutory construction. Section 2263(b)(2), the parallel tolling provision for habeas petitions in capital cases, expressly limits its terms to state proceedings. It defies logic that Congress would grant greater tolling, and thus more expansive opportunities for federal habeas review, in non-capital cases than in capital cases. The Second Circuit further ignored the fact that when Congress sought to bring both federal as well as state proceedings within AEDPA's scope, it did so expressly. *See, e.g.*, 28 U.S.C. §§ 2263(b)(2), 2254(i), 2261(e), and 2264(a)(3). Indeed, the loose statutory interpretation that led the Second Circuit to construe the word "other" as referring to "federal" is particularly inappropriate, given that references to sovereign entities should be strictly construed and implied references to sovereign entities should be avoided.

Finally, the Second Circuit's construction of section 2244(d)(2) undermines the goal of AEDPA's statute of limitations and the total exhaustion requirement established in *Rose v. Lundy*, 455 U.S. 515 (1982). A petitioner could circumvent the statute of limitations by deliberately or inadvertently filing an unexhausted federal habeas petition because, under the Second Circuit's interpretation, the one-year limitations clock of section 2244(d)(1) would freeze as soon as the petition were filed. This result would prolong indefinitely the review process and unnecessarily burden federal courts with piecemeal litigation – an outcome wholly inconsistent with this Court's habeas jurisprudence and AEDPA's objectives of lending finality to state court judgments, fostering exhaustion of state court procedures, and enhancing the efficiency of federal habeas review.

The judgment of the Second Circuit should be reversed.

ARGUMENT

A FEDERAL HABEAS PETITION IS NOT AN "APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW" WITHIN THE MEANING OF THE TOLLING PROVISION APPLICABLE TO AEDPA'S STATUTE OF LIMITATIONS

In breaking with every other circuit court to address the issue, the Second Circuit erred in construing section 2244(d)(2) as tolling AEDPA's limitations period during the pendency of any prior federal habeas petition. The Second Circuit's reading of section 2244(d)(2) is contrary to the plain text of the provision, the applicable canons of statutory construction, the principles of comity and federalism underlying the exhaustion requirement for federal habeas

petitions and the policy of AEDPA. Accordingly, the judgment of the Second Circuit must be reversed.

I. The Plain Language Of The Tolling Provision Does Not Encompass Prior Pending Federal Habeas Petitions

In construing the meaning of the tolling provision for AEDPA's statute of limitations, this Court's analysis begins, "as always, with the language of the statute." *Williams v. Taylor*, 120 S. Ct. 1479, 1487 (2000) (interpreting another provision of AEDPA, 28 U.S.C. § 2244(e)(2)). Indeed, "a natural reading of the full text" is the "first criterion in the interpretive hierarchy" for a statute. *United States v. Wells*, 519 U.S. 482, 490 (1997).

Section 2244(d)(2), which tolls the one-year statute of limitations established by AEDPA, reads as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

The United States Courts of Appeals for the Third, Fifth, and Ninth Circuits have concluded that this provision does not toll AEDPA's one-year period of limitations during the pendency of a federal habeas petition. *See Jiminez v. Rice*, 222 F.3d 1210, 1213 (9th Cir. 2000); *Grooms v. Johnson*, 208 F.3d 488, 489 (5th Cir. 1999); *Jones v. Morton*, 195

F.3d 153, 158-59 (3d Cir. 1999). These courts of appeal have determined that the word "State" in the phrase "State post-conviction or other collateral review" modifies both "post-conviction" and "other collateral" in defining the kinds of review that toll the running of the limitations period. *See Jiminez*, 222 F.3d at 1213; *Grooms*, 208 F.3d at 489; *Jones*, 195 F.3d at 159.[4]

Similarly, the Fifth, Sixth, Tenth and Eleventh Circuits have held that petitions for certiorari to this Court do not constitute "other collateral review" within the meaning of § 2244(d)(2) because such petitions are not applications for "State" review. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Isham v. Randle*, 226 F.3d 691, 695 (6th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1834 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1155-56 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000).

In this case, the Second Circuit acknowledged that "[i]t is possible to interpret the word 'State' in section 2244(d)(2) to modify both 'post-conviction' and 'other collateral.' " *Walker*, 208 F.3d at 359. (Pet. App. 5a) But the Second Circuit nonetheless split with all other circuit courts that have considered the issue. It found that " 'State' modifies only

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4. Legal scholars have failed to countenance a viable contrary interpretation, and instead simply have stated unequivocally that section 2244(d)(2) does not toll AEDPA's statute of limitations during the pendency of a federal habeas petition. *See* Larry W. Yackle, *Post-Conviction Remedies* 346 (1st ed. Supp. 2000); Richard H. Fallon, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 162 (4th ed. Supp. 1999); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 229-30 (3d ed. 1998).

the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning" to include federal habeas petitions. *Id.* According to the Second Circuit,

> [t]he disjunctive "or" in the statute creates a distinct break between the two kinds of review. . . . [A]pplying "State" to both of the disjunctive phrases would create a linguistic oddity because the statute would refer to "a properly filed application" for "State post conviction . . . review" or "State . . . other review." "State other **collateral** review" is an ungainly construction that we do not believe Congress intended.

Id. at 359-60 (emphasis in original). (Pet. App. 5a-6a)

The Second Circuit's interpretation of "State" as modifying only "post-conviction," rather than the entire phrase following that word, impermissibly rewrites the plain language of the provision in two important ways.

First, the Second Circuit's interpretation effectively inserts the word "review" at a second point in the phrase "applications for State post-conviction or other collateral review" — at the point following "State post-conviction" and before "or other collateral review." As the Second Circuit acknowledges, its interpretation disjoins the phrase into two distinct forms of review, "State post-conviction" review and "other collateral review." *See id.* at 360. (Pet. App. 6a) Had Congress so intended to create a complete disjunction between the two halves of the phrase, it could have achieved a grammatical break in precisely this manner, by inserting the word "review" after "post-conviction" in the first half of

'the phrase. Congress, however, did not do so. Instead, the word "review" appears only once, at the end of the phrase.

The more natural reading of the statute, which eschews the Second Circuit's effective rewrite of the provision, is that Congress intended the entire subject of the prepositional phrase modifying "application" — "State post-conviction or other collateral review" — to be read as a single unit. Read in this manner, the word "State" modifies the only noun ("review"), which is the object of the preposition "for", at the point at which the noun appears in the phrase. *Cf. International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 79-80 (1991) (interpreting statute by finding that there is only one grammatical subject modified by a compound prepositional phrase). Indeed, the absence of any comma or other punctuation dividing the phrase "State post-conviction or other collateral review" provides further "useful confirmation" that Congress intended such a reading. *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979); *cf. United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (finding support for a "natural reading" of a statutory phrase as independent of subsequent statutory language in the fact that the phrase "is set aside by commas").[5]

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5. Moreover, the statutory canon of *ejusdem generis* provides that "a general statutory term should be understood in light of the specific terms that surround it." *Hughey v. United States*, 495 U.S. 411, 419 (1990). Applying this principle, "other collateral review" must be read in light of the words that immediately precede it, including "State." Thus "other collateral review" means "other State collateral review, and does not denote an entirely new, non-state class of review." *Sperling v. White*, 30 F. Supp. 2d 1246, 1253 (C.D. Cal. 1998).

Second, the Second Circuit's interpretation renders meaningless a critical word in that phrase — "State". Had Congress intended both state and federal petitions for collateral review to be encompassed within the tolling provision, it could simply have omitted "State" from the phrase "State post-conviction or other collateral review" and provided that the "time during which a properly filed application *for post-conviction or other collateral review* . . . is pending shall not be counted toward any period of limitation." It is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000) (internal quotation marks omitted). By concluding that the tolling provision sweeps all habeas petitions within its scope, the Second Circuit violated this basic principle.

The Second Circuit recognized the importance of this principle, erroneously justifying its conclusion on the ground that "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Walker*, 208 F.3d at 360. (Pet. App. 6a) But this reasoning rested on a critical, but incorrect, assumption: that there is no "other collateral review" in State courts apart from State "post-conviction" review.

Habeas corpus is "a remedy available to effect discharge from *any* confinement contrary to the Constitution or fundamental law" — civil or criminal. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) (emphasis added). *See generally* 1B Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation* § 10.7 (3d ed. 1997) (collecting cases demonstrating that habeas corpus is available to mental patients, juvenile delinquents and those detained upon a

finding of civil contempt). When an order of confinement is not premised on a criminal conviction, remedies challenging that confinement are not, by definition, "post-conviction," but nevertheless may be "collateral." *See Parke v. Raley*, 506 U.S. 20, 30 (1992) (defining collateral attack as a proceeding with an independent purpose other than to overturn a prior judgment that, if successful, would deprive the prior judgment of its normal force and effect).

Indeed, there is a wide variety of State "collateral review" that is not "State post-conviction" review. A ready example that is widely recognized in the law involves challenges to confinement in a mental institution. Individuals seeking release from a mental institution may apply for federal habeas relief. *See* Schwartz & Kirklin, *supra*, at 599; *see also Souder v. McGuire*, 516 F.2d 820, 823 (3d Cir. 1975) ("There is no question about the appropriateness of habeas corpus as a method of challenging involuntary commitment to a mental institution.").

In order to obtain federal habeas review of a confinement, however, a person must first exhaust available state court procedures. *See* 28 U.S.C. §§ 2254(b), (c); *Buthy v. Commissioner of the Office of Mental Health*, 818 F.2d 1046, 1051 (2d Cir. 1987) (noting that plaintiff could challenge pre-hearing confinement in "forensic unit" of mental facility "only by petitioning for a writ of habeas corpus and after exhausting state remedies as required by 28 U.S.C. § 2254(b), (c)").[6]

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6. *See also Kolocotronis v. Holcomb*, 925 F.2d 278 (8th Cir. 1991) (holding that habeas petitioner confined in state hospital, pursuant to verdict of not guilty by reason of insanity, sufficiently alleged exhaustion of state remedies).

In New York, the available State court procedures that must be exhausted prior to a federal habeas proceeding seeking review of a mental health confinement include State habeas corpus proceedings. *See, e.g., Mental Hygiene Legal Services ex rel. Cruz v. Wack*, 551 N.E.2d 95 (N.Y. 1989) (reviewing State habeas corpus proceeding in which petitioner sought release from psychiatric facility). Because confinement in a mental health facility most often results *without* a criminal conviction, *see, e.g., id.*, 551 N.E.2d at 95 n.1 (State habeas petitioner committed to state psychiatric facility after held not guilty by reason of mental disease or defect), such State habeas proceedings are in fact proceedings for State "collateral," rather than "post-conviction," review.

Similarly, challenges to pre-trial detention are proper subjects for federal habeas review if state remedies have been exhausted. *See Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 488-90 (1973) (pre-trial federal habeas relief based on denial of speedy trial is available to petitioner in custody who exhausts available state court remedies). Again, a state collateral proceeding is the means by which the legality of pre-trial detention must be challenged before a federal habeas petition may be brought. *See, e.g., People ex rel. Klein v. Krueger,* 255 N.E.2d 552, 553-54 (N.Y. 1969) (state habeas petitioner may challenge denial of bail or amount at which bail is fixed); *People ex rel. Chakwin v. Warden*, 470 N.E.2d 146, 148 (N.Y. 1984) (state habeas petitioner may challenge allegedly unlawful pre-trial detention in violation of state "speedy trial" statute); *see generally* Jack B. Weinstein, et al., *New York Civil Practice* § 7002.03 (2000) (citing cases that New York state habeas corpus is proper remedy for unlawful detention based on amount of bail or trial delay). Because an incarcerated person awaiting trial has not yet

been convicted, he or she must, in order to bring a federal habeas petition, exhaust a state court remedy for collateral relief that is in no way a "State post-conviction" remedy.

Far from being meaningless, therefore, Congress's inclusion of the phrase "other collateral review" in section 2244(d)(2) simply obviated the need to catalog exhaustively the numerous and varied state court collateral review remedies that do not fall within the ambit of state "post-conviction" review. Because "post-conviction" review is a subset of "other collateral review," reading the words "other collateral review" in section 2244(d)(2) to include only state petitions for collateral review does not, as the Second Circuit asserted, deprive the phrase of meaning.[7]

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7. Indeed, the broad ramification of the Second Circuit's interpretation of the tolling provision — to exclude other state collateral review from the scope of AEDPA (as well as from the scope of the tolling provision) — is without support. AEDPA did not so drastically alter the scope of the federal habeas corpus remedy as to exclude review of civil judgments or pre-conviction orders leading to confinement, thereby limiting the remedy to review of confinements based exclusively upon criminal convictions. *See, e.g., Francis S. v. Stone*, 221 F.3d 100 (2d Cir. 2000) (applying AEDPA to federal habeas petition filed by a petitioner committed to a mental institution pursuant to a plea of not responsible by reason of mental disease or defect).

In fact, section 2244(d)(2) contemplates that a petitioner may pursue "State post-conviction or other collateral review with respect to the pertinent *judgment or claim*" (emphasis added). If Congress had not intended for the federal habeas remedy to remain available for challenges to the legality of confinement *not* premised on a criminal conviction, it would have been unnecessary for Congress to have included the words "or claim" in section 2244(d)(2).

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To the contrary, by interpreting the provision as it did, the Second Circuit rendered meaningless and effectively eliminated the word "State" from the phrase at issue, or else inserted the word "review" after the phrase "State post-conviction." Courts "are not free, under the guise of construction, to amend the statute" where Congress has chosen its words carefully. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 (1952). Rather, "when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947 (2000) (internal quotation marks omitted).

This remains true in the habeas corpus context. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("[W]e have long recognized that 'the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law,' and we have likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.' ") (citations omitted); *see also Artuz v. Bennett*, 121 S. Ct. at 365 (2000) ("[I]t is not the province of this Court to rewrite the [AEDPA] statute . . . .").

Had Congress intended for section 2244(d)(2) to include the word "review" twice — or, for that matter, to include

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See Williams, 120 S. Ct. at 1520; *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (refusing to regard particular words of statute as "mere surplusage"). Moreover, AEDPA left unchanged 28 U.S.C. § 2254(a), which provides that habeas relief is available to a person in custody "pursuant to the judgment of a State court." The provision does not distinguish between civil and criminal confinements.

any express mention of federal habeas petitions at all — "it could simply have said so." *Hartford Underwriters*, 120 S. Ct. at 1947; *see also Williams v. Taylor*, 120 S. Ct. at 1488 ("Had Congress intended a no fault standard [in 28 U.S.C. § 2254(e)(2) as amended by AEDPA], it would have had no difficulty in making its intent plain. It would have had to do no more than use, in lieu of the phrase 'has failed to,' the phrase 'did not.' "). This Court should refuse to alter the plain language of the statute.

II. Traditional Principles of Statutory Construction Confirm That Section 2244(d)(2) Does Not Encompass Pending Federal Habeas Petitions

That the plain language of Section 2244(d)(2) does not encompass federal habeas applications is confirmed by traditional principles of statutory construction: first, that similar provisions in the statute should be examined to shed light upon the meaning of the provision at issue; second, that the breadth of the language at issue should be compared to other more specific references in the statute to determine whether it would be consistent with the statute as a whole to infer specific meaning from a broad phrase; and third, that statutory references to sovereign entities should be specified by Congress and should not be lightly inferred from broad textual language, especially in the context of habeas corpus, where delineation of the respective roles of the federal and state sovereigns is paramount.

A. Comparison Of The Tolling Provision At Issue To The Tolling Provision Applicable To The Statute of Limitations In Capital Cases Confirms Petitioner's Interpretation

The tolling provision at issue here most closely resembles section 2263(b)(2), the tolling provision applicable to federal habeas petitions in capital cases. *See* 28 U.S.C. § 2263(b)(2). Section 2263(b)(2) tolls the limitations period in capital cases "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." *Id.* By using "post-conviction review or other collateral relief" to refer solely to relief sought in "State court," Congress left no doubt that, for habeas petitions in capital cases, the previous filing of an unexhausted federal habeas petition does not toll the statute of limitations.

There is no basis in law or policy to believe that Congress intended to toll the statute of limitations for both pending federal and state habeas proceedings in non-capital cases, but only for state habeas proceedings in capital cases. To the contrary, statutory construction

> is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Inc., 484 U.S. 365, 371 (1988) (citations omitted); *see also United States Nat'l Bank of Oregon v. Independent*

Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (" '[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)); *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (reading of statute that is "plausible when viewed in isolation" is "untenable in light of" statute "as a whole").

Such is the case here. By stating clearly that the tolling of the limitations period in capital cases is to apply only to pending state court proceedings, Congress left no doubt as to the proper interpretation of the tolling provision applicable in non-capital cases as well. It defies logic to believe that Congress intended to allow for unexhausted federal habeas petitions to toll the limitations period in all cases *except* capital cases, where the consequences of constitutional error are of the highest potential order of gravity.

B. Where Congress Intended In AEDPA To Reference Both State And Federal Collateral Proceedings, It Did So Expressly And Explicitly

An examination of other provisions of the federal habeas statute, as amended by AEDPA, confirms that section 2244(d)(2)'s use of the words "State post-conviction or other collateral review" does not contemplate that the filing of federal habeas petitions will toll the one-year period of limitations. *See Gutierrez v. Ada*, 120 S. Ct. 740, 744 (2000) ("[W]ords and people are known by their companions."). Where Congress meant in AEDPA and the habeas statute to refer to both state and federal proceedings, it did so explicitly.

For example, AEDPA provided that "[t]he ineffectiveness or incompetence of counsel during *Federal or State collateral post-conviction proceedings* shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i) (emphasis added). The parallel provision for habeas procedure in capital cases states not only that "[t]he ineffectiveness or incompetence of counsel during *State or Federal post-conviction proceedings* in a capital case shall not be a ground for relief," but also that "[t]his limitation shall not preclude the appointment of different counsel . . . at any phase of *State or Federal post-conviction proceedings*." *Id.* § 2261(e) (emphases added). Likewise, AEDPA provided that, in habeas petitions in capital cases, a district court may consider a claim not raised and decided on the merits in the state courts if, *inter alia*, the failure to raise the claim properly is "based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim *for State or Federal post-conviction review*." *Id.* § 2264(a)(3) (emphasis added).

Provisions such as sections 2254(i), 2261(e), and 2264(a)(3) underscore that when Congress intended in AEDPA to refer to both state and federal post-conviction or collateral review, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994); *see also Martin v. Hadix*, 527 U.S. 343, 354 (1999) (rejecting construction of statute where Congress "could have used language more obviously targeted" to alleged statutory purpose). "It simply isn't plausible" that Congress, which was so clear in the other sections of AEDPA, "would be so delphic" in section 2244(d)(2). *Lindh v. Murphy,* 521 U.S. 320, 331-32 (1997); *see also Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership,* 526 U.S. 434, 450 (1999) ("It is unlikely that the drafters of legislation so long and minutely complicated . . . would have used two distinctly different

forms of words for the same purpose."); *Russello v. United States,* 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *id.* (refraining from concluding that "differing language" in two subsections of statute "has the same meaning in each" and refusing to ascribe "this difference to a simple mistake in draftsmanship").

C. In Construing References To Sovereign Entities, Especially In Statutes Where Federalism Issues Lie At The Core, Broad Construction Has No Place

Finally, had Congress intended section 2244(d)(2) to toll the one-year limitations period for proceedings in federal courts as well as those in state court, " 'the ordinary dignities of speech would have led' to its mention [of federal proceedings] by name." *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941) (citation omitted) (holding that provision of Sherman Act authorizing "any person" to bring action for trebles damages does not authorize action by the United States government).[8]

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8. *Cooper* quoted *Davis v. Pringle*, 268 U.S. 315 (1925), in which Justice Holmes, in interpreting a provision of the Bankruptcy Act, stated for this Court:

> The States are mentioned [in subsection] (5) before the United States, showing that their laws were primarily in mind. The United States seems added to avoid some possibly overlooked case. The ordinary dignities of

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This is so because the words "State" and "Federal" are not ordinary words; rather, they refer to entities having special significance in the constitutional scheme. The interrelationship of state and federal entities "occupies a highly important place in our Nation's history and its future." *Younger v. Harris,* 401 U.S. 37, 45 (1971).

Indeed, our constitutional scheme rests upon the fundamental constitutional independence of the state and lower federal courts. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 285-286 (1970). Especially in the context of federal habeas relief — where Congress is concerned particularly about delineating the respective roles of federal and state courts — it strains credulity and violates sound principles of statutory construction to think that Congress intended, without saying so expressly, that section 2244(d)(2)'s use of "other collateral relief" would refer to federal habeas petitions.

Unquestionably, habeas corpus implicates "[t]he complexities of our federalism." *Brown v. Allen,* 344 U.S. 443, 498 (1953) (Frankfurter, J.); *see also Williams v. Taylor,* 120 S. Ct. at 1490 ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts."); *Duckworth v. Eagan,* 492 U.S. 195, 210 (1989) (noting that habeas " 'intrudes on state sovereignty

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> speech would have led to the mention of the United States at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States.

Davis, 268 U.S. at 318.

to a degree matched by few exercises of federal judicial authority' ") (O'Connor, J., concurring) (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). The interrelationship of federal and state court proceedings lies at the very historic core of habeas doctrine:

> This seemingly technical problem of jurisdiction concerns the relation of the United States and the courts of the United States to the States and the courts of the States. Under any circumstances, this is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years.

Darr v. Burford, 339 U.S. 200, 220 (1950) (Frankfurter, J., dissenting) (internal quotation marks omitted).

Accordingly, in a statute where the respective roles of the federal and state courts are defined with specificity, "loose statutory construction" has no place. *Atlantic Coast Line R.R.*, 398 U.S. at 287.

> Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

Palmer v. Massachusetts, 308 U.S. 79, 83-84 (1939).

In light of these basic principles, section 2244(d)(2)'s use of the words "other collateral relief" should not be interpreted to refer to proceedings by a different and unspecified sovereign — here, the federal government — when the provision at issue mentions only "State" proceedings.

III. Tolling The Statute Of Limitations For Pending Federal Habeas Petitions Would Be Contrary To The Values And Purposes Underlying AEDPA

As the Second Circuit acknowledged, AEDPA's establishment of a statute of limitations applicable to federal habeas petitions "was a dramatic change in the law and was Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions." *Walker*, 208 F.3d at 361. (Pet. App. 8a) In the ten years prior to AEDPA's enactment, more than 80 bills proposing a statute of limitations for habeas corpus petitions had been introduced in Congress. *See Lonchar v. Thomas*, 517 U.S. 314, 333 (1996) (Appendix listing the bills). When Congress finally reformed the habeas corpus laws in 1996, the new one-year limitations period for filing habeas petitions was a key element of the reform effort to address "acute problems of unnecessary delay" in habeas review, *see* H.R. Conf. Rep. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944, so as to promote finality to and respect for state court judgments.

The Second Circuit justified its reading of the tolling provision on the basis that the congressional goal in enacting the limitations period was "to spur defendants to file their federal habeas petitions more quickly," that is, to give defendants "an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations." *Walker*, 208 F.3d at 361. (Pet. App. 8a) This view of congressional goals fails to come to terms with the fundamental values and purposes underlying AEDPA and its statute of limitations.

The statute of limitations enacted in AEDPA was written to balance twin goals of comity in tension, *i.e.*, to balance

the goal of reducing delays to the finality of state convictions, with the goal of ensuring full exhaustion of state court remedies. *See* H.R. Rep. No. 104-23, at 9 (1995) (explaining the statute of limitations provisions are designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner") (Judiciary Committee report accompanying H.R. 729, an immediate precursor of AEDPA in the same Congress, which contained the identical statute of limitations enacted under AEDPA).

AEDPA did so by enacting a statute of limitations which allows for exhaustion of state remedies in two ways: by commencing the limitations period, at the earliest, after the direct appellate review process is over, *see* 28 U.S.C. § 2244(d)(1)(A), and by enacting a tolling provision for properly filed applications for State post-conviction or other collateral review of the judgment or claim, *see id.* § 2244(d)(2). Tolling the statute of limitations for state court collateral proceedings furthers comity, because it allows and encourages full exhaustion of state court remedies, thereby affording state courts the first opportunity to consider prisoners' federal claims as the case advances toward finality.

By interpreting the tolling provision as encompassing federal habeas petitions, however, the Second Circuit undermined AEDPA's purpose of promoting the finality of state court judgments without furthering any competing purpose of comity. *See Jiminez v. Rice*, 222 F.3d 1210, 1214 (9th Cir. 2000) ("Applying § 2244(d)(2) to a federal petition does nothing to further Congress's intent to promote exhaustion of state relief.").

If, as the Second Circuit held, tolling were permitted for federal habeas petitions, then habeas petitioners would be encouraged to make federal court their first stop. But in *Rose v. Lundy*, 455 U.S. 509 (1982), this Court construed pre-AEDPA sections 2254(b) & (c) to require a district court to dismiss federal habeas petitions containing both exhausted and unexhausted claims (*i.e.*, "mixed" petitions). *See Rose*, 455 U.S. at 522; *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("[A] state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to *any* of his federal claims.") (emphasis added). This rule requiring exhaustion of all claims in a federal petition was adopted with several purposes. One was to "encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Rose*, 455 U.S. at 518-519. Another purpose was "to encourage habeas . . . petitioners to present the federal court with a single petition." *Id.* at 520. The Court in *Rose* reasoned that its total exhaustion rule would benefit "both the courts and the prisoners" to the extent it "reduces piecemeal litigation" and "provide[s] for a more focused and thorough review." *Id.*

Under the Second Circuit's interpretation, there would be no practical incentive, despite *Rose v. Lundy*, for a petitioner to evaluate his or her claims for exhaustion prior to filing in federal court, because the one-year limitations clock would freeze as soon as the federal petition was filed, fully exhausted or not. Moreover, if the petitioner wished to buy additional time prior to filing in state court, he or she simply could file a series of unexhausted petitions in federal court, tolling the statute indefinitely.

The Second Circuit's reading of the tolling provision as encouraging early filings of federal habeas petitions, *see Walker*, 208 F.3d at 360-61 (Pet. App. 8a), thus creates an incentive out of step with this Court's habeas jurisprudence. If, as the Second Circuit suggested, section 2244(d)(2) were intended to "reward" a petitioner who files any federal habeas petition by tolling the one-year period of limitation, *id.*, then a petitioner easily could "circumvent the limitations period imposed by the AEDPA," *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir.), *cert. denied*, 121 S. Ct. 404 (2000), by filing unexhausted claims in federal habeas petitions as a means of prolonging the review process. This clearly would undermine the very purpose of the total exhaustion "rule," *i.e.*, to reduce "piecemeal litigation" by presenting all of their claims to a federal court in "a single habeas petition." *Rose*, 455 U.S. at 520; *see also Harris v. Reed*, 489 U.S. 255, 269 (1989) (O'Connor, J., concurring) ("[T]he [exhaustion] rule furthers the interest in the efficiency of federal habeas corpus, by assuring that, in general, the factual and legal bases surrounding a petitioner's constitution claim or claims will have been developed in a prior adjudication.")

Such an interpretation, by encouraging early, ill-considered, or repeat federal habeas filings, moreover, would place a substantial burden on federal courts. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey v. Zant,* 499 U.S. 467, 491 (1991). Indeed, in the year ending September 30, 1999, prisoners filed 23,821 habeas corpus petitions (not involving the death penalty) in the federal courts, comprising almost 10% of the total number of civil cases filed. *See* 1999 Director's Ann. Rep., Jud. Bus. of the U.S. 138, 140.

The broader ramifications of the burden that even readily dismissed petitions place on the federal courts and on petitioners with meritorious claims has long been recognized. In 1953, after 541 habeas petitions challenging state convictions had been filed in 1952, Justice Jackson criticized this Court's habeas decisions as enabling

> floods of stale, frivolous and repetitious petitions [to] inundate the docket of the lower courts and swell our own. Judging by our own disposition of habeas corpus matters, they have as a class become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones.

Brown v. Allen, 344 U.S. 443, 536-37 & n.8 (1953) (Jackson, J., concurring in the result) (footnotes omitted); *see also Keeney v. Tamayo-Reyes,* 504 U.S. 1, 7 (1992) ("Federal habeas litigation also places a heavy burden on scarce judicial resources, may give litigants incentives to withhold claims for manipulative purposes, and may create disincentives to present claims when evidence is fresh."); *Schneckloth v. Bustamonte,* 412 U.S. 218, 260 (1973) (Powell, J., concurring) (same).

By encouraging the early and repeat filing of federal habeas petitions, therefore, the Second Circuit's interpretation would encourage delay and undermine the finality of state court convictions, without advancing any principles of exhaustion and comity, while also burdening scarce federal judicial resources and federal petitioners with meritorious claims. This is contrary to the goals and purposes of AEDPA. The Second Circuit's interpretation of the tolling provision must be rejected under the plain language of the statute, principles of statutory construction, and the values and purposes underlying AEDPA.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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